IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 204

JOHN LACKNER,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITION OF JOHN LACKNER FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, John Lackner, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court entered on the 4th day of April, 1940, in the case numbered and entitled on its docket No. 7010, *John Lackner, Appellant* v. *Illinois Bell Telephone Company, et al., Appellees,* affirming the decision of the United States District Court in and for the Northern District of Illinois,

Eastern Division, wherein petitioner was denied leave to file intervening petition on behalf of himself and other telephone subscribers in a proceeding before said District Court concerning the refund to said subscribers of overcharges paid by them for telephone service in the City of Chicago. A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith. The decision of the Circuit Court of Appeals is reported in 111 Fed. (2nd) 136 (1940), and is attached as an appendix hereto.

Summary and Short Statement of the Matter Involved.

This case challenges the constitutionality of a proceeding whereby the customers of the Illinois Bell Telephone Company were deprived of $2,197,000 due them as refunds for overpayments made in excess of the legal rate for telephone service as established by an order of the Illinois Commerce Commission, which refunds were ordered returned to them by a mandate of this Court. Diligent search has failed to produce a single decision, with the exception of the decision of the Circuit Court of Appeals herein, of Federal or State courts that directly governs the issue presented by this petition.

At the conclusion of litigation extending over a period in excess of eleven years, this Court affirmed an order of the Illinois Commerce Commission establishing reduced telephone rates in Chicago. Subscribers were compelled to pay a higher rate during the entire period of litigation because of an injunction issued by the District Court restraining the Illinois Commerce Commission from enforcing the reduced rate. This Court, by its mandate in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, 176, remanded the case with direction "to dissolve

the interlocutory injunction, to provide for refunding in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the Company in excess of the rates in suit". (R. 2.) The injunction bonds filed by the Telephone Company provided that it should repay with interest "any sums paid by the said subscribers to the plaintiff for telephone service rendered said subscribers, or any of them, pursuant to the provisions of the said order of the Illinois Commerce Commission." (R. 4-6.)

The petitioner and subscribers similarly situated who had paid the Telephone Company the sum of $18,798,980.14 in excess of the legal rate, and who filed claims and qualified for refunds and were entitled to receive the same under the aforesaid mandate of this Court, failed to secure full reimbursement of the amount due them by approximately $2,197,000.00. The deficiency was brought about through two orders of the District Court entered without notice to said subscribers and without giving them their day in court, whereby (1) two attorneys, who had likewise been appointed without notice to the subscribers or an opportunity on the part of the subscribers to be heard, were allowed $1,500,000.00 as fees (R. 47), and (2) the State of Illinois was allowed $60,000.00, the City of Chicago $37,000.00 (R. 469), and (3) interest due under the injunction bond was waived to the extent of $600,000.00. (R. 455.) The total aggregate of these sums, or $2,197,000.00, was deducted from the fund created by the overpayments made by the subscribers.

The attorneys who received the fee did not notify their clients (the subscribers) that they would apply to the District Court for an allowance of fees, but proceeded

to conduct the hearing on their petition *ex parte* and in a dual capacity, representing themselves as petitioners and the subscribers as respondents.

At the expiration of the time set by the District Court for the filing of claims, there remained in the refund account an undistributed balance of $1,688,295.68. (R. 409.) This fund was, at said expiration date, and still is, in the possession of the Telephone Company. The State of Illinois, the County of Cook and the City of Chicago immediately filed petitions claiming this balance. The State of Illinois was represented by the Attorney-General, the County of Cook by the State's Attorney, and the City of Chicago by its Corporation Counsel. The District Court denied all petitions.

Notwithstanding the substantial fee the attorneys appointed by the Court had received and their apparent duty to protect the interests and rights of the subscribers, and the further fact that the subscribers entitled to full refund had not received the sums they were entitled to, to the extent of $2,197,000.00, no effort was made by said attorneys to claim this fund for the subscribers who, under the terms of the mandate of this Court and the construction placed upon said mandate by the District Court, were solely entitled thereto. (R. 446-453.) The District Court commented on the lack of interest on the part of these attorneys by stating, "They have made no recommendation as to the distribution of this unclaimed balance of funds, nor have they taken any stand in reference to the claims of the City or the other claimants for reimbursement of expenses." (R. 450.)

When it became apparent that this fund of approximately $1,700,000.00 would become the property of the Telephone Company by default, petitioner, in behalf of

himself and other subscribers similarly situated, having in mind the deficit of $2,197,000.00, presented his intervening petition to the District Court and asked leave to file the same. This petition contained in substance the facts hereinabove set forth and concluded with the allegation that the subscribers, by reason of having failed to receive notice and an opportunity to be heard, had been deprived of their property without due process of law and in violation of Article V of the Bill of Rights of or the 5th Amendment to the Constitution of the United States.

This petition was presented to the District Court on March 2, 1938, by informal motion. No argument was presented by either side at that time, neither was any testimony heard by the court. The motion to intervene was taken under advisement by the District Court on that date. (R. 471.) No further proceedings, arguments or hearings were ever held in connection with the said petition from that date forward. However, about one year later, March 13, 1939, the District Court entered an order to the effect that "This cause coming on to be heard on the petition of John Lackner, the Court having heard the arguments of counsel, It Is Ordered that the prayer of the said Petition be and the same is hereby denied." (R. 489.) No findings of fact or propositions of law were submitted by the Court in support of said order.

The order of the District Court denying the right of the appellant to intervene on behalf of himself and other subscribers similarly situated was appealed to the United States Circuit Court of Appeals for the Seventh Circuit. This latter court affirmed the ruling of the lower court on the general theory that if any prejudice had been suffered by the subscribers through lack of notice or an

opportunity to be heard when the attorneys were appointed by the court and allowed a fee of $1,500,000.00, this prejudice, if any, was compensated by the fact that the Attorney General, who was in the case for the sole purpose of representing the Illinois Commerce Commission, and the Corporation Counsel, who was in the case for the sole purpose of representing the City of Chicago, were present when the orders were entered. (*Illinois Bell Telephone Co.* v. *Slattery,* 102 Fed. (2d) 58-62 (1939). This position was taken by the United States Circuit Court of Appeals notwithstanding the fact that the Attorney General and Corporation Counsel subsequently demonstrated their respective interests were antagonistic to that of the subscribers by filing a petition to secure the unclaimed balance of $1,700,000.00 and made no effort to advance the interests of the subscribers, and the further undisputed fact that the District Court must have been of the contrary opinion when it deemed it necessary to appoint other attorneys than the Attorney General and Corporation Counsel to represent subscribers in the refund proceedings. The Circuit Court of Appeals did not specifically dispose of the objection regarding allowance of litigation expense to the State and City or the waiver of interest required by the injunction bond except to say that petitioner's petition did not specifically set up these objections. The Circuit Court of Appeals also held that the receipt of a check by appellant a year after the entry of the order of July 23, 1934, tended to create grounds for the impression that appellant had legal notice of the proceedings complained of herein. The check was not a part of the record or printed abstract filed in the Circuit Court of Appeals, neither was it before the District Court at the time it entered any of its orders in the refund proceedings. Three days

before this case was due to be argued orally before the Circuit Court of Appeals, and several weeks after printed abstract of the record and briefs had been filed by both sides, the Telephone Company made a motion to consider an unauthenticated photostatic copy of this check as part of the record. The Circuit Court of Appeals, over objection of appellant, allowed the motion, notwithstanding the fact that inasmuch as it was not a part of the record filed therein this check could not be and was not referred to or argued in appellant's brief. We discuss this phase of the case more in detail in our brief filed in support of this petition.

If the decision of the Circuit Court of Appeals is permitted to stand, subscribers of public utilities who are compelled to pay illegal and excessive rates will be deprived of their constitutional right to notice of proceedings governing the return of their property and be denied the fundamental right of having their day in court to be heard regarding the impairment or disposition of said property rights.

Subject-Matter.

The subject-matter of this proceeding originated with petitioner's motion as a subscriber of the Telephone Company for leave to file his intervening petition in behalf of himself and other subscribers similarly situated, praying, among other things, that the District Court's decree of July 23, 1934, and its order of February 5, 1938, be set aside account of lack of legal notice to the subscribers of proceedings had in connection therewith. The former decree allowed $1,500,000.00 attorneys' fees and waived interest due the said subscribers, under the provisions of an injunction bond filed by the Telephone Company, in the sum of approximately $600,000.00. The latter order al-

lowed the State of Illinois $60,000.00 and the City of Chicago $37,000.00 for "litigation expense", and resulted in the Telephone Company obtaining by default possession of an unclaimed balance of refund moneys amounting to approximately $1,700,000.00. (R. 469, 470.)

Petitioner represented to the Circuit Court of Appeals that the refund declared to be due subscribers by the decision of this Court in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, 176 (1934), created in each of said subscribers a property right surrounded and safeguarded by definite constitutional guarantees: (1) The right to receive proper and legal notice when proceedings were contemplated that would in any manner depreciate or affect those rights. (2) The right to their day in court and an opportunity to be heard before a decision concerning said rights was entered by the court. In substance, they urged upon the court that they could not be deprived of their aforesaid property rights without due process of law. Petitioner further represented that the subscribers' interest in the funds held by the Telephone Company created a basis for intervention as of right and because of the presence of this interest in the subject-matter the District Court had no discretion in permitting the filing of the said petition and in denying them this right the District Court's order was in error and contrary to Rule 24-a of the Federal Rules of Civil Procedure then in force and effect. (3) Petitioner further represented that the personal interest of Messrs. Haight and Goldstein, the attorneys appointed by the court, disqualified them from representing the subscribers as well as themselves, the said attorneys, in the proceeding which resulted in said attorneys being allowed fees of $1,500,000.00 from funds belonging to said subscribers.

The decision of the Circuit Court of Appeals did not directly decide any of the above issues. It avoided these issues by taking the position that the Illinois Commerce Commission and the City of Chicago in their public capacity also represented the individual subscribers in a matter concerning the latter's private property rights. It should be clearly borne in mind that this proceeding is essentially different from reparation cases heretofore considered by this Court and District Courts in that the present case presents a situation where subscribers' rights to refund had become final and absolute by the decision of this Court. (*Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934). The funds involved were just as much their private property as their private bank account or other personal property. The Illinois Commerce Commission and City of Chicago, by the very nature of their legal existence, have to do solely with public rights and interests as distinguished from the individuals' personal property rights. No law ever gave the Illinois Commerce Commission or the City of Chicago authority to interfere with private individual rights where, as in this case, those rights in no way conflicted with the rights of the public as a whole. The Circuit Court of Appeals in its decision did not explain why the District Court specifically, although illegally, appointed special attorneys for this very purpose, if, as it contended, the subscribers' rights were amply protected by the public law officers. Neither did it explain why the said special attorneys could, under the circumstances, be properly allowed $1,500,000.00 fees, or that subsequently both public law officers sought to obtain the unclaimed refund balance of $1,700,000.00 for their respective clients, the State and the City, and why no one intervened in behalf of the subscribers to protect the latter's interest in said fund. Neither did the decision explain why the special

attorneys, appointed by the court ostensibly to protect the subscribers' interest, stood silently by and permitted the Telephone Company to claim the fund by default, while the subscribers, individually and as a group, were prevented by an injunction order of the District Court from retaining any other attorney to look after their interest (R. 35-39-42), which, at that time, was represented by a deficit of $2,197,000.00.

The Circuit Court of Appeals attempted to justify the lack of notice by holding that the receipt of a check by petitioner a year after the entry of the order here complained of, constituted actual notice. This check does not, in any sense, constitute such notice as is contemplated by the constitution of the State of Illinois or the constitution of the United States, and we are confident petitioner would have demonstrated this fact to the Circuit Court of Appeals if given an opportunity to do so. However, the unauthenticated photostatic copy of the check which was not a part of the record in the proceedings before the District Court, was presented by the Telephone Company for the first time in proceedings before the Circuit Court of Appeals several weeks after the record, the printed abstract thereof and briefs of both parties had been filed. On the morning of the day this case was called for oral argument before the Circuit Court of Appeals, said court entered an order permitting the unauthenticated photostatic copy of the check to be considered as part of the record. This gave petitioner no opportunity to prove the document's insufficiency or illegality. It is respectfully represented that this order of the Circuit Court of Appeals was clearly in error.

If the decision of the Circuit Court of Appeals is permitted to stand, it will create a precedent detrimental

to the interests of every subscriber to public utility service throughout the nation. It will give notice that proceedings concerning refunds in which said subscribers have a definite and vital property interest may be conducted by public utilities without giving the subscribers legal notice or an opportunity for said subscribers to be heard in defense of their own property rights. It will further encourage public utilities to presume upon this lack of constitutional protection in the conduct of its litigation in attacking valid rate orders of state public utility commissions throughout the nation.

Questions Presented.

1. Whether public utility subscribers in rate reparation proceedings are entitled to the same consititutional guarantees that are accorded other citizens in the disposition of their private property rights.

2. Whether a deficiency of $2,197,000.00 represents such an interest in an unclaimed refund balance of $1,700,000.00 as comes within the provisions of Rule 24-a of the Federal Rules of Civil Procedure, and entitles public utility subscribers to intervene as a matter of right in a proceeding governing the disposition of said unclaimed fund.

3. Whether a District Court in a rate reparation proceeding may allow attorneys' fees of $1,500,000.00 from subscribers' funds where said attorneys represent conflicting interests—their own interests as beneficiaries of said fees, and the property right interests of their clients in the funds from which said fees are paid.

4. Whether a District Court in a rate reparation proceeding, without notice to interested parties, has authority

to nullify the conditions of an injunction bond and waive interest requirements to the extent of $600,000.00.

5. Whether subscribers in a rate reparation proceeding must be first fully reimbursed in accordance with the mandate of this Court before distribution of funds constituting excessive rate payments shall be made to the State and the City for "litigation expense".

6. Whether a public utility may profit to the extent of $1,700,000.00 by reason of its eleven years' unsuccessful litigation in an effort to avoid a valid rate order of a State Commission where subscribers have failed to receive full reimbursement in accordance with the mandate of this Court.

Reasons Relied on for the Granting of the Writ of Certiorari.

1. The case presents questions of the first importance relating to the constitutional rights of subscribers in public utility reparation cases which have not heretofore been passed upon by this Court. An authoritative decision of these questions by this Court is of pressing importance not only to the parties to this cause but also the millions of like subscribers whose interests are directly affected in present and future refund litigation.

2. The decision of the Circuit Court of Appeals in recognizing a right in a public utility to profit by its defiance of a valid and constitutional order of a State Commission, while the subscriber suffers a deficit in the amount of $2,197,000.00 due them account of excessive rates paid through court order, has established a precedent of importance to rate payers in Illinois, as well as other States, and one that is contrary to the best interests of public policy. Such a precedent gives support

to the utilities' asserted ownership of all unclaimed funds and encourages their opposition to Commission orders, for experience has demonstrated that in every rate case, upon the ultimate dissolution of an injunction, so widespread, changed and confused are the individual ratepayers, there is a substantial balance which cannot be returned to particular subscribers who made the excessive payments. (Public Utility Refunds (Feb. 1939) 15, The Journal of Land and Public Utility Economics, 12.)

3. The matter here involved is of grave and pressing importance in the regulation of public utilities. The principle established makes it possible for a utility to collect excessive charges from its millions of subscribers over a long period of time under promise of repayment, and then to retain the unclaimed balance. The decision of the Circuit Court of Appeals permits the mere choice of a method of collecting excessive charges and the method of administering the repayment of those charges, adopted for reasons of economy and expediency, to dictate a result that is not only grossly unfair and inequitable, but contrary to the intention of the parties. The unclaimed fund of $1,700,000 should not be kept by a wrongdoer in preference to the subscribers who created said fund by forced payment of excessive charges under an injunctional court order.

4. The question here raised should, in the greater interests of the public, be settled. This Court should review the interpretation of a decree having such far-reaching significance. (*St. Louis, Kansas City & Colorado R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 251 (1910)).

5. Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the

additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court and the Supreme Court of the State of Illinois.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals, or such portion thereof as this Court may deem necessary, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

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JOHN C. DEWOLFE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court did not render a written opinion. The order denying leave to intervene as entered appears on page 489 of the Record.

The order of the Circuit Court of Appeals for the Seventh Circuit, denying the Telephone Company's motion to dismiss petitioner's appeal, appears on page 522 of the Record. The Circuit Court of Appeals did not render a written opinion in deciding this motion.

The opinion of the Circuit Court of Appeals herein complained of is reported in 111 Fed. (2d) 136 (1940), and appears on page 539 of the Record.

Jurisdiction.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit was entered on April 4, 1940.

2. The judgment was rendered as a part of a proceeding in connection with a suit in equity originally filed by the Illinois Bell Telephone Company seeking a temporary and permanent injunction against the Illinois Commerce Commission to restrain the Commission from enforcing its telephone rate order of August 16, 1923. The Telephone Company failed to sustain its contentions and the proceeding was reversed and remanded with orders to refund all excess charges made in connection therewith. (*Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934).) The immediate proceeding upon

which this petition is based is the motion of John Lackner to file an intervening petition on behalf of himself as a subscriber of the Telephone Company and other similar subscribers to receive full reimbursement of overcharges paid by them to the Telephone Company in conformance with the mandate of this Court in the case of *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151 (1934).

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C. Title 28, Section 347 (a).

Statement of the Case.

The facts are sufficiently stated in the petition, to which reference is made.

Specifications of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In failing to hold that the subscribers are entitled to notice of all proceedings involving said subscribers' personal property rights as represented by their interest in the fund constituting overcharges made by and paid to the Telephone Company by said subscribers.

2. By holding that the presence of representatives of the Illinois Commerce Commission and the City of Chicago in the District Court when the order of July 23, 1934, was entered allowing Messrs. Haight and Goldstein $1,500,000.00 fees, removed the disqualification of personal

interest of said attorneys and the further objection that said attorneys represented conflicting interests in that proceeding—their interest as beneficiaries of the fee,—and the interests of the subscribers, owners of the fund from which said fees were paid.

3. In holding that neither the petition nor the record disclose any justification for assuming that subscribers suffered any injury by reason of their not being a party to the record.

4. In holding that the unauthenticated photostatic copy of the check received by petitioner a year after the order of July 23, 1937, was entered, constituted actual notice of the refund proceedings in the District Court.

5. In holding that the application of the petitioner was not timely.

6. In holding that the subscribers accepted the benefits of the order complained of with full knowledge of and acquiescence in said order.

In the interest of brevity (Rule 38, Par. 2; *Furness, Withy & Co., Ltd.* v. *Yang Tsze Ins. Assn., Ltd.*, 242 U. S. 430), petitioner does not at this time set forth all of the points which will be urged at the arguments on the merits of this cause, should the writ be granted, nor all of the contentions in support of such points; but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (*Gunning* v. *Corley*, 281 U. S. 90, 98), petitioner here refers to and incorporates into this petition all the matters presented in its Statement of Points Relied Upon on the appeal to the Circuit Court of Appeals for the Seventh Circuit (R.

492), with the same force and effect as if herein set out in full.

Summary of Argument.

The points of argument follow in the main the reasons relied upon for the allowance of the writ of certiorari, and are stated in the index hereto *supra*, page i.

ARGUMENT.

I.

Failure of subscribers to receive notice of the proceedings whereby their pro rata share of the refund was reduced $2,197,000.00 was a violation of their constitutional rights guaranteed under the State and Federal Constitutions. The decision of the Circuit Court of Appeals holding to the contrary was in error.

(A) *No person shall be deprived of his property without due process of law.*

(B) *No valid allowance of attorneys' fees could be made unless notice was first given to the subscribers.*

While the appointment of attorneys to represent the subscribers without notice to said subscribers was contrary to law, the allowance to these attorneys of a fee of $1,500,000 to be paid out of the funds of said subscribers, was particularly obnoxious as a violation of said subscribers' constitutional rights guaranteed them under the provisions of the United States and State Constitutions. (5th Amendment of the Constitution of the United States; Sec. 2 of the Bill of Rights of the Constitution of the State of Illinois.) Our Illinois Supreme Court has definitely declared this to be the law. In the case of *Rabbitt* v. *Weber & Co.*, 297 Ill. 491, the Court said, on page 496:

> "Section 2 of the bill of rights provides that no person shall be deprived of life, liberty or property without due process of law, under which no citizen

can be deprived of property without due notice and an opportunity to be heard in defense and enforcement of his right. This Court expressed the principle in *Haywood* v. *Collins,* 60 Ill. 328, by saying that the very security of property requires notice of some kind to the owner before he should be deprived of it, and justice can never be administered in its true spirit when either the person or property is condemned without notice. The principle did not originate in the American system of constitutional law. (*Munn* v. *Illinois,* 94 U. S. 113.) It was preserved in Magna Charta but was known before and regarded as a part of the ancient English liberties (*Ochoa* v. *Hernandez y Morales,* 230 U. S. 139); and well it may have been, because it is fundamental in every conception of justice, and while it came to this country as a part of the common law, it is both the constitutional and statutory rule in the judicial system of the Federal government and of every state. Without notice and an opportunity to defend, the right of private property could not exist in the sense in which it is known to our laws, and this general principle has been frequently declared. (*Bickerdike* v. *Allen,* 157 Ill. 95; *Gage* v. *City of Chicago,* 225 *id.* 218; *Flexner* v. *Farson,* 268 *id.* 435; 6 R. C. L. 433; 12 Corpus Juris, 1228.) There is a necessary limitation in cases where the proceeding is merely *in rem* and the necessities of the case require substituted service, but even in such cases the statute must provide for such service and the notice required must be given. Due process of law prevents a divestiture of title without notice and an opportunity to be heard, and it is elementary that jurisdiction over parties is only obtained by notice, actual or constructive, and a judicial judgment pronounced without such jurisdiction is void. (*Campbell* v. *Campbell,* 63 Ill. 462.) Under the constitutional provision a party is not only entitled to notice of the proceeding against him but is also entitled to be heard in his defense. (*Hultberg* v. *Anderson,* 252 Ill. 607), and the rule extends to every right which a citizen has. (*Klafter* v. *Examiners of Architects,* 259 Ill. 15.)"

In *Merchants Bank of St. Joseph* v. *Chrysler,* 67 Fed. 388, where a fee was allowed an attorney without notice to his clients, the court said:

> "The parties to the suits, therefore, have an interest in the amount of such allowances, and according to well established principles they should have notice of application for such allowances and should be given an opportunity to defend. Any other practice might and would lead to great abuses."

The court in the case of *Cauther* v. *Cauther,* 56 S. E. 978 (Supreme Court S. C. 1907), in condemning the practice of *ex parte* hearings on attorneys' fees, said:

> "The fact that the inquiry relates to a claim for services rendered in the confidential relation of attorney and client only emphasizes the impossibility of representation in such circumstances."

The Court here indicated the impossibility of attorneys representing themselves as well as their client in a hearing pertaining to the allowance of a fee to said attorneys.

The above authorities were binding and effective upon the Circuit Court of Appeals under the decision of this Court in the case of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 78 (1938).

It is clearly apparent from the foregoing authorities that the orders complained of were complete nullities. They had no binding legal force or effect. Payments made under these orders were void. The subscribers have an undisputed right to insist that they be reimbursed for all such funds so paid out, particularly when they have failed to receive the full share of their refund moneys as ordered by the mandate of this Court in the instant case and the Telephone Company has in its possession unclaimed funds sufficient to make such reimbursement.

II.

The decision of the Circuit Court of Appeals that subscribers had no interest in the unclaimed funds is in conflict with applicable decisions of this Court, the Circuit Court of Appeals for the Seventh Circuit, and of other Circuit Courts of Appeals.

The petitioner herein was a subscriber of the Telephone Company prior to and during the years of 1923 to 1939, inclusive, during which time the respondent contested the valid rate order of the Illinois Commerce Commission. Petitioner together with thousands of other similar subscribers paid to the Telephone Company the excessive rates charged by it during that period.

This Court intended the subscribers should receive the full amount of these overcharges. (*Lindheimer et al.* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176.) By its mandate of May 30, 1934, it remanded the original case with instructions "to dissolve the interlocutory injunction, to provide for refunding in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the company in excess of the rates in suit, and to dismiss the bill of complaint."

The order granting the interlocutory injunction referred to in the mandate provided for the filing of a bond by the Telephone Company "conditioned so that in the event that this interlocutory injunction shall be hereafter dissolved the plaintiff shall refund to its several subscribers, either in cash or by credit, upon subsequent bills, any sums paid by them in excess of the sums chargeable to them pursuant to the provisions of said order of the Illinois Commerce Commission." (R. 3.)

The bond filed by the Telephone Company provided that it should repay* *with interest* "any sums paid by the said subscribers to the plaintiff for telephone service rendered such subscribers in excess of the sums chargeable to said subscribers, or any of them, pursuant to the provisions of the said order of the Illinois Commerce Commission." (R. 4-6.)

The District Court, in its opinion of December 23, 1937, referring to the above opinion of this Court said:

> "As we read that decision and as we now read it, we were only authorized to make refunds in accordance with the terms of the injunction and of the bond given pursuant thereto. This being so and as we again read the injunction and the bond and construe the word 'refund', we find ourselves limited to directing the Telephone Company to pay excess charges to its customers." (R. 446, 453.)

The Circuit Court of Appeals for the Seventh Circuit, in its opinion of August 9, 1938, denying the right of the State to the unclaimed balance, said:

> "The only provision in the mandate here material was that for the refunding in accordance with the terms of the injunction and the bond given pursuant thereto of the amounts charged by the plaintiff in excess of the rates fixed by the Commission. By express language of each, as heretofore related, such refund was for the benefit of plaintiff's subscribers." (*Illinois Bell Telephone Co.* v. *Slattery*, 98 Fed. (2d) 930, 933.)

This same court, in the decision herein complained of, said:

> "The mandate of the Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra*, commanded the District Court to dissolve the interlocutory injunction and to provide for the refunding 'in accordance with

* Italics ours.

> the terms of that injunction and of the bonds given pursuant thereto, of the amount charged by the company in excess of the rates,' etc. The injunction decree was conditioned upon the repayment to subscribers of any sums paid by them in excess of the sums chargeable by reason of the order of the Illinois Commerce Commission, in case the injunction should thereafter be dissolved."

The Circuit Court of Appeals for the Seventh Circuit also in the case of *Illinois Bell Telephone Company* v. *James M. Slattery et al.*, 102 Fed. (2d) 58, referring to the decree of the District Court of June 11, 1934, entered in the present proceeding, and the $1,688,295.68 here in dispute, said:

> "A reading of this decree, as well as what transpired in court at the time of its entry, and subsequently, convinced us that neither the court nor any of the parties at that time had in mind, intended to or made provision for the disposition of funds which might remain in the possession of the plaintiff, unclaimed by subscribers after June 1, 1937, nor that there was any intention to release plaintiff of any liability for such unclaimed funds."

The District Court, therefore, made no final disposition of the unclaimed fund, nor did it release the Telephone Company of liability therefor when it entered its decree of February 5, 1938, but on the contrary made it subject to the interest of any of the subscribers as future circumstances might demand.

In *Merchants Bank of St. Joseph* v. *Chrysler*, 67 Fed. 388, where a fee was allowed an attorney without notice to his clients, the court set the order aside and held that the client had a definite interest in said proceeding and it was therefore necessary that attorneys give them notice of any such proceeding. The court said:

> "The parties to the suits, therefore, have an in-

> terest in the amount of such allowances, and according to well established principles they should have notice of application for such allowances and should be given an opportunity to defend. Any other practice might and would lead to great abuses."

The court in the case of *Cauther* v. *Cauther*, 56 S. E. 978, (Supreme Court S. C. 1907), in condemning the practice of *ex parte* hearings on attorneys' fees, said:

> "The fact that the inquiry relates to a claim for services rendered in the confidential relation of attorney and client only emphasizes the impossibility of representation in such circumstances."

All of the above clearly indicates that until the subscribers have been fully reimbursed for all overcharges they retain a definite interest in the funds created by said overcharges. It is not denied by the Circuit Court of Appeals that the subscribers have failed to receive full reimbursement. If the subscribers ever had any interest in the fund it was for full reimbursement, and until that objective was an accomplished fact their interest continued to remain in said fund.

To hold, as the Circuit Court of Appeals did in this case, to the contrary was clearly in error.

III.

The decision of the Circuit Court of Appeals in denying the right of petitioner to intervene in behalf of himself and other similar subscribers was in conflict with the provisions of Federal Rules of Civil Procedure, Subsection A, Rule 24.

As heretofore pointed out under Point II of this brief, the subscribers had a clear interest in the unrefunded balance. This being the fact, it necessarily follows that

it was error to deny petitioner's right to file his petition in behalf of himself and other similar subscribers. Rule 24, Subsection A, accords anyone the right to intervene "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof." (*U. S.* v. *C. M. Lane Lifeboat Co.*, 25 Fed. Supp. 410 (1938).)

Our courts have consistently held that when the above facts are present the defendant has an absolute right to intervene. In the case of *Credits Commutation Co.* v. *U. S.*, 91 Fed. 570, on page 573, the Court said:

> "It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration, to which a third party reserves some right which will be lost in the event he is not allowed to intervene before the fund is dissipated. In such cases, the order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of intervener's claims by denying him all right to relief."

Also in the case of *United States Trust Co.* v. *Chicago Terminal Transfer Railway Co.*, 188 Fed. 292, on page 296, the Court said:

> "Applications for leave to intervene are of two kinds. In one the applicant has other means of redress open to him and it is within the court's discretion to refuse to encumber the main case with collateral inquiries. In the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending case."

Again in the case of *Credits Commutation Co.* v. *U. S.*, 91 Fed. 570, the Court said:

> "There is a class of cases in which a party has the equitable right to intervene and the right to review by appeal any order denying that right. * * * This class includes those cases in which one claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that court."

Similar conclusions were reached by the court in the case of *U. S.* v. *Philips*, 107 Fed. 824, and *Minot* v. *Mastin*, 95 Fed. 734.

Inasmuch as in the present case there was a fund in court undergoing administration, to which the defendant and similar subscribers as third parties had a right which would be lost in the event that he was not allowed to intervene before the fund was dissipated, it is respectfully submitted that defendant's application to intervene came clearly within the provisions of the law as set forth in the above cases and therefore the District Court erred in denying him the right to file his intervening petition herein.

IV.

The statutes of the State of Illinois provided a means whereby full restitution could be made without any expense to the subscriber.

The Illinois Revised Statutes 1939, Chap. 111⅔, Paragraph 76, (72) provides that—

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after

> a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.
>
> "If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail, he shall be allowed a reasonable attorneys fee to be taxed and collected as a part of the costs of the action."

This provision of the statute would have been available to all subscribers, including the defendant, if the "special attorneys" had not recommended to the District Court in their report of June 11, 1934, that "there be an injunction issued herein restraining all persons from any action to recover the refunds except through this Court." (R. 35.) This restraining order was accordingly provided for in the Court's decree of June 11, 1934, as follows:

> "8. No subscriber entitled to refunds hereunder shall have the right to maintain any remedy whatsoever to collect said refunds either in cash, by counterclaims or credit on bills in any manner except by action in this Court, and in this cause, and then only upon an affirmative showing that such subscriber has made application to the plaintiff for such refund and plaintiff, after having checked the claim of such subscriber, has refused to make payment. * * *" (R. 42.)

This restraining order resulted in subscribers being permanently barred from recourse to the above provision of the statute, brought about by action of attorneys who were appointed by the court without subscribers' knowledge, consent or notice to them, and who were ostensibly appointed to "protect" the subscribers' interests.

When the "special attorneys" presented their report recommending the restraining order and asking that they be allowed fees, they never advised the District Court of the above section of the statute whereby subscribers could collect the full amount of their refund, and if any expense for attorneys' fees was incurred the Telephone Company would have been compelled, under the said statutory provisions, to reimburse the subscribers for any such expense. This "protection" of the subscribers' interests by these "special attorneys" cost defendant and similar subscribers $1,815,599.04 for attorneys' fees and interest (R. 47, 377-455), neither of which would have been allowed under the foregoing statutory provisions.

It is, therefore, respectfully submitted that in this instance as well as others throughout the refund proceedings the protection of the interests of the defendant and similar subscribers was wholly and grossly inadequate, that said subscribers had a very definite interest in the $1,688,295.68 unclaimed balance, as they had not received the full amount of their refund in accordance with the decree of this Court, and further that under the prevailing law and facts of this case, the said subscribers would have been bound by the judgment entered by the District Court concerning the said sum of $1,688,295.68 and they had no other legal recourse than to assert their rights by means of an intervening petition in the present proceeding. It was, therefore, error to deny the defend-

ant the right to file his intervening petition in behalf of himself and other subscribers similarly situated.

V.

The refund check received by subscribers did not constitute legal process, and the District Court, therefore, lacked jurisdiction to enter any order affecting the private rights of the subscribers who were never parties to the proceeding. Lapse of time would not, therefore, bar subscribers' right to challenge the jurisdiction of the court in entering said order. Questions of jurisdiction may be raised at any time throughout the proceeding.

The refund check referred to by the Circuit Court of Appeals in its decision was an unauthenticated photostatic copy of a document which had been made a part of the record by that court without any showing as to the correctness of the said copy, the validity of the signature appearing thereon, or as to the correctness of the contents thereof. It was issued in the name of the Illinois Bell Telephone Company and consisted of a number of very fine printed items followed by figures indicating the amount due. It did not purport to be issued under the authority of any particular court. There was no indication or reference on the face of the document that it was issued in connection with any specific legal proceeding. No title of said proceeding was indicated, the name of the court was not shown, neither was there any court number by which a case could be identified. In fact, there was nothing about the document that would direct the average layman's attention to any reference whatever concerning court proceedings in which court orders had been entered. The important items were in prominent

black type—amount to be paid and the name of the payee. All else was blurred into the body of the check in an insignificant and unobtrusive manner. The "process of law" required by the Constitution certainly never contemplated a document of this character as fulfilling that requirement. Lawful process in any proceeding manifestly refers to process emanating from a court or by the authority of a court, and cannot be understood to refer to such acts or notices *in pais* between private parties as derive no authority from a court. Process of law in a broad sense means law in its regular course of administration through courts of justice. (50 C. J., Sec. 11, page 445; *Healey* v. *Geo. F. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 270; *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431; 2 Coke Inst. pp. 51, 52; *State* v. *Shaw*, 73 Vt. 149.) Such attributes could not legally be given to the check received by the subscribers of the Telephone Company.

The District Court's orders allowing attorneys' fees, litigation expense to third parties, and waiving interest requirements of the injunction bond, was in every sense a judgment of that court whereby the subscribers were deprived of their property to the extent of the sum involved in each order. At the time of the entry of these orders the subscribers were not parties to the proceedings in which the said orders were entered. (111 Fed. (2d) 136 (1940).) All of these orders were entered without process having been issued to the subscribers or the court having obtained jurisdiction of their person. Process is necessary in order to acquire jurisdiction to proceed against a person or warrant an adjudication by the court of the property rights of persons interested in the subject matter of the controversy, or authorize an order in summary proceedings *in personam* against a third party

not a party to the suit, or render a judgment valid and conclusive, and these requisites are necessary even though the person has knowledge of the suit. (50 C. J., Sec. 17, page 446; *Flexner* v. *Farson,* 268 Ill. 435, 109 N. E. 327; *In re Utah Constr. Co.'s Water Right,* 30 Fed. (2d) 436, 440; and *McCoy* v. *Watson* (Miss.), 122 S. 368, 370.)

Mere publication over the Telephone Company's name of notice to apply for refunds could not of necessity be a valid substitute for court process. No legal means was ever taken to bring any of the subscribers within the jurisdiction of the court, so as to give the court authority to dispose of any of the subscribers' property rights.

There must be some service on the defendant in some mode authorized by law or the court cannot proceed, and a judgment rendered without such service is a nullity. So the rule prevails that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or property and the statutory mode of service or of giving notice must be followed, including requirements as to time. * * * A person's knowledge of the existence of an action, no matter how clearly brought home to him, does not supply the want of compliance with the statutory or legal requirements as to service, nor does a person's mere presence in court give jurisdiction to enter a judgment against him when he was not brought there by any legal means. (15 C. J., Sec. 96, page 798.)

The court therefore lacked jurisdiction at the time of the entry of these orders and all of its actions, in so far as the subscribers were concerned, were an absolute nullity. When petitioner presented his petition to the District Court, he challenged that jurisdiction and did so prior to the final disposition of the refund proceeding.

He had the legal right to do so at any time throughout the refund litigation. (*Smith* v. *Woolfolk*, 115 U. S. 143; *People* v. *Miller*, 339 Ill. 573, 578.)

The Circuit Court of Appeals was therefore in error in holding that the right of petitioner to file his petition herein was properly denied by the District Court because his application had not been timely.

VI.

The check received by subscribers does not constitute a bar to full reimbursement for moneys paid to the Telephone Company account of excess telephone service rates.

The demand in this case was liquidated and at the time of the receipt of the check by subscribers it was likewise due. It was for a sum less than the amount due the subscribers under the mandate of this Court. Where a demand is liquidated and is due, payment and receipt of a less amount is not a satisfaction of the demand, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of less than is due operates only as a discharge of the amount paid, leaving the balance still due. (1 C. J., Sec. 40, pages 539-40.)

The reason for the rule is that the agreement is without consideration and void, as the debtor is under an obligation to pay the whole debt at the time and the creditor is entitled to receive the whole. In the absence of statute providing otherwise, the rule is settled that the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof, although ac-

cepted as such, as the element of consideration is lacking, and it is immaterial that the receipt was given with knowledge of the facts and that there was no error or fraud. (1 C. J., Secs. 41 and 45, pages 541 and 543; *Chicago, etc., R. Co.* v. *Clark,* 92 Fed. 968; *Bingham* v. *Brouning,* 97 Ill. App. 442, and *Ryan* v. *Ward,* 48 N. Y. 204, 8 Am. R. 539.)

It must therefore follow that the receipt of the refund check by subscribers in no way affected their right to demand full payment of their claim against the Telephone Company.

We believe it pertinent to call to this Court's attention the fact that another effort was made to intervene in behalf of the subscribers in this case. (*Berman* v. *Illinois Bell Telephone Co.,* 304 U. S. 549.) The effort did not meet with success. There is a vast difference between the nature of that proceeding and the present one. In the former, Berman in substance claimed the District Court had "made a mistake in administering a trust fund" as represented by the excess payments made by the subscribers. No constitutional question was raised in that proceeding, as has been done in this case. Neither did Berman challenge the jurisdiction of the District Court to enter any of the orders complained of herein, as does the present proceeding. The Berman proceeding presented no question which properly called for consideration by this Court, and an order was accordingly entered affirming the action of the District Court in denying him the right to intervene. Inasmuch as there is a clear distinction in the issues presented by this case as distinguished from the Berman case, it is respectfully submitted that the ruling in the Berman case can in no manner affect the merits of the present petition.

CONCLUSION.

We have endeavored to demonstrate the vital importance of the issues involved in this case, not only to the immediate subscribers, but to the many thousands of subscribers to other public utility service who are at the present time and in all probability will be in the future placed in the same position as the Telephone Company subscribers find themselves today. At the present time the Gas Company of this city is engaged in refunding a sum in excess of $3,000,000.00 to its subscribers. Other utilities throughout the country are doubtless engaged in similar proceedings. No legal precedent has been established that finally determine the subscribers' rights in matters of such vast importance and involving unusually large sums of money belonging to the public generally.

Two major issues presented here—constitutional guarantee and jurisdiction of the court—seem to be clear cut and sharply defined. We respectfully submit that the writ of certiorari should be issued in order that this unsatisfactory condition may be disposed of finally and effectively by this Honorable Court.

Respectfully submitted,

MELVIN L. GRIFFITH and
JOHN C. DEWOLFE,
Counsel for John Lackner, Petitioner.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 7010. OCTOBER TERM, 1939, JANUARY SESSION, 1940.

JOHN LACKNER, *Appellant*,
vs.
ILLINOIS BELL TELEPHONE COMPANY, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 4, 1940.

Before MAJOR and TREANOR, *Circuit Judges*, and SULLIVAN, *District Judge*.

TREANOR, *Circuit Judge*. This is an appeal from an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, which denied appellant's petition for leave to intervene after final decree in the case of *Illinois Bell Telephone Company* v. *Slattery*,[1] final decree in that case having been affirmed by this court before the present appeal was taken. The purpose of the petition to intervene was to set aside the aforesaid final decree and set aside or modify other decrees previously entered in the course of the litigation in the Chicago Rate Refund case.[2]

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1 102 Fed. 2nd. 58, Certiorari denied 307 U. S. 648.

2 For various phases of this litigation see *Smith* v. *Ill. Bell Tel. Co.*, 269 U. S. 531; Id., 282 U. S. 133, 51 S. Ct. 65; Id., 283 U. S. 808, 51 S. Ct. 464; *Ex parte Smith*, 283 U. S. 794, 51 S. Ct. 482; *Illinois Bell Telephone Co.* v. *Slattery*, 98 Fed. 2nd. 930; Id., 102 Fed. 2nd. 58; *Lindheimer et al.* v. *Ill. Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658

As a result of the judgment of the United States Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra,* Note 2, the District Court undertook to administer the refunding of the amount of overcharge of subscribers of the Telephone Company. The magnitude of the operation, which involved 1,495,947 refunds amounting to a total of over $18,000,000, necessarily required elaborate machinery. To secure adequate protection of the interests of subscribers the District Court designated Messrs. George I. Haight and Benjamin F. Goldstein, who had conducted the litigation as special counsel for the City of Chicago, to act as counsel for the subscribers to "protect and preserve" their rights and interests. In its decree of June 11, 1934, the District Court limited the period for the filing of claims, ordered that the refund period should terminate June 1, 1937, and that with the expiration of the refund period the Telephone Company should be released "as to all refunds which it has not been able to make in compliance herewith."

At the expiration of the refund period on June 1, 1937, the Telephone Company made its final report to the District Court and petitioned that the court determine that the Telephone Company had complied with the prior court orders in respect to the refunds and further asked that the termination of its liability for further refunds be confirmed. Despite the most extensive efforts to reach the subscribers and to get them to file claims a large number of claims were not presented within the refund period; and at the expiration of the period there remained unrefunded in claims and interest thereon the sum of $1,688,296. The Telephone Company, however, was entitled as an offset for unpaid bills to at least one-third of the foregoing sum.

The City of Chicago, the County Treasurer of Cook County, Illinois, and the State of Illinois each presented petitions seeking to secure the unclaimed overcharges. By decree of February 5, 1938, the District Court denied the petitions of the City of Chicago and of the State of Illinois and dismissed the petition of the Treasurer of Cook County, confirmed the termination of liability of the Telephone Company to make further refunds, and closed the proceedings. The decree of the District Court was affirmed by this Court February 22, 1939. (*Ill. Bell Tel. Co.* v. *Slattery, supra.*)

On March 2, 1938, Lackner, appellant herein, presented his petition to the District Court for leave to intervene on

behalf of himself, all other subscribers, customers and other persons similarly situated. It is the general theory of the petition that a 7½% deduction from the amount of petitioner's refund to pay attorney's fees was an illegal deduction and that there is still available in the control of the Telephone Company unrefunded overcharges from which to pay petitioner and other subscribers the 7½% deduction.

It is clear that petitioner has no interest in the so-called unclaimed refunds. It is petitioner's theory, as stated in his brief, that he failed to receive full payment of his claim against the defendant company because of the 7½% deduction for attorney's fees and the waiver of part of the interest, and, also, because of the illegal allowances for litigation expenses. In his petition, however, petitioner claims underpayment only in the amount of the deduction of 7½% for attorney's fees. There is no allegation of fact in the petition to disclose that any portion of the petitioner's claim is included in the total of the unclaimed overcharges. And in fact the Telephone Company, acting under the order of the District Court, deducted the 7½% and paid it to the attorneys. Petitioner cannot base his claim to intervene upon the ground that he has any interest in the unclaimed overcharges.

The mandate of the Supreme Court in *Lindheimer* v. *Illinois Bell Tel. Co., supra,* commanded the District Court to dissolve the interlocutory injunction and to provide for the refunding "in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amount charged by the company in excess of the rates," etc. The injunction decree was conditioned upon the repayment of subscribers of any sums paid by them in excess of the sums chargeable by reason of the order of the Illinois Commerce Commission, in case the injunction should thereafter be dissolved. The bond secured the repayment of any excess charges "in such way and manner as the District Court" should thereafter direct.

Under the mandate of the Supreme Court in the Lindheimer case the District Court was required to provide the machinery for the repayment to subscribers of the excess charges. In view of the magnitude of the task it was necessary that the District Court exercise a wide discretion in working out the details, both for the purpose of insuring an accurate determination of the

amount of excess charges and for the purpose of getting notice to individual subscribers. During the period of litigation ending with the decision of the Supreme Court in the Lindheimer case the subscribers had been represented by the Illinois Commerce Commission through the Attorney General of Illinois, and by the City of Chicago, through its corporation counsel and special counsel, Messrs. Haight and Goldstein. On June 1, 1934 the District Court designated Messrs. Haight and Goldstein to represent and protect the interests of subscribers during the refunding operation; and on July 23, 1934, the District Court fixed the compensation of the attorneys at 7½% of the amount which the telephone company had been ordered to repay to its customers. This order authorized and directed the Telephone Company to deduct "from the customer's refund seven and one-half per centum (7½%) of the amount of refund due to the customers."

The appointment of special counsel to represent the subscribers was made with the approval of the Illinois Commerce Commission and the City of Chicago. Special counsel for subscribers recommended a plan for making the refunds to the subscribers and it was approved by the District Court and incorporated in the decree of June 11, 1934. This decree specified that the amount of "suitable attorney's fees and compensation out of the refund" would be determined later. The decree of June 11 fixed the end of the period for refund and provided that the liability of the Telephone Company should terminate as of that date, June 1, 1937; and as stated above it provided for the payment of the fees of the special attorneys out of the amount of the subscribers' refunds. In general the order of June 11 fixed the rights and liabilities of all the parties. The later order of July 23, 1934, definitely fixed the compensation of the special attorneys at 7½% of the amount which the Telephone Company had been ordered to pay to its customers.

Petitioner does not complain in his petition of any violation of his rights by the order of June 11, 1934; but does claim that the District Court, by its decree of June 1, 1934, designating Haight and Goldstein as special counsel to protect and preserve the rights of the various subscribers, and the order of the court of July 23, 1934, allowing fees to these attorneys and authorizing the Tele-

phone Company to deduct 7½% from the amount of the refund due each customer, and the final decree of the District Court of February 5, 1938, were made without notice to the subscribers and without an opportunity to be heard; and that by reason of the foregoing the petitioner was deprived of property without due process of law.

The record discloses adequate representation of the petitioner and other subscribers at the hearing of June 1, 1934 at which time the court ordered the appointment of special counsel to protect the interests of the subscribers and authorized the counsel to present a refunding plan. All subscribers were represented by the Attorney General of Illinois acting for the Illinois Commerce Commission and corporation counsel acting for the City of Chicago. The record facts do not support petitioner's contention that he was deprived of property without due process of law by reason of lack of representation at the hearing of June 1, 1934.

The petition contains no attack on the validity of the order of June 11, 1934, although this order is the basis of the entire refunding operation, fixes the rights of the parties, and makes the fees of the special attorneys a charge against the total amount of the refunds to the subscribers. Petitioner questions the validity of the order of July 23, 1934 only "insofar as it fixes the fees of said attorneys," and only on the ground that the order was made without notice to the subscribers and without an opportunity for them to be heard.

The appointment of the special attorneys to represent the subscribers in the refunding operation and to provide a special protection for their interests in the refund of overcharges did not end the representation of the subscribers by the Illinois Commerce Commission and the City of Chicago. Consequently, the contention of petitioner that the subscribers were not adequately represented at the hearing of July 23, 1934 because of the personal interest of Haight and Goldstein in the fixing of the amount of their fees, must be considered in the light of the representation of subscribers by the Commerce Commission and the City of Chicago, through their respective counsel, who had no interest adverse to that of the subscribers and who were still charged with a duty to protect the subscribers' interest. Granting the validity of the order of June 11, 1934, the action of the District

Court of July 23, 1934, fixing the amount of the fees could have been questioned only in respect to the reasonableness of the amount. The record discloses that there was a hearing and that the court gave consideration to different factors in arriving at the amount. Furthermore, the District Court had been in close touch with the entire refunding operation and had first-hand knowledge of the value of the services rendered by counsel and likewise was familiar with the amount of labor and expense involved in the performance of these services. What constituted a reasonable allowance for fees was a question to be determined by the District Court, and even upon a direct appeal from the order of allowance the only basis for an overruling of the decision of the trial court would have been an abuse of discretion. The petition contains no general charge of fraud or deceit or collusion in respect to any of the orders of the District Court and there is an entire absence of allegations of fact which would constitute fraud or deceit or collusion. We cannot assume that the order fixing the amount of the fee was invalid or erroneous merely because it may appear to be an unusually large fee; and neither the petition nor the record facts disclose any justification for our assuming that petitioner suffered any injury by reason of his not being a party of record.

There is a factual situation which would preclude the petitioner's recovery of the amount of deduction from his overcharge for attorney's fees, even if permitted to intervene. In April, 1935, petitioner received payment of his claim for the amount of the overcharge. This check shows that the amount of the overcharge was $13.96; that the interest allowed thereon was $4.96, and that the amount deducted for petitioner's contribution to the payment of subscribers' attorneys was $1.42. The check recites that the refund was "pursuant to order of the District Court of June 11, 1934;" that the payment of interest was as ordered by the District Court June 11, 1934; and that the deduction was for fees to be paid to subscribers' attorneys as ordered by the District Court July 23, 1934. The notation respecting the deduction indicated that there was an allowance of 7½% as fees. Thus the petitioner had actual notice as early as April, 1935, that 7½% of the amount of his overcharge had been deducted for attorney's fees in accordance with the order of the District Court of July 23, 1934. The final decree in the

proceedings was not entered until February 5, 1938, and petitioner did not present his petition for leave to intervene until March 2, 1938. It cannot be said that petitioner's petition to intervene was timely; and in our opinion it would be a misapplication of the rule permitting intervention to allow petitioner to intervene after final judgment to upset an order of the court of which he had actual notice more than two years prior to final judgment, and, especially so, when it appears that he had accepted the benefits of the order with full knowledge of, and acquiescence in, that portion of the order of which he now complains. We are of the opinion that the District Court did not err in denying petitioner's petition to be permitted to intervene.

The order of the District Court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 204

JOHN LACKNER,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

BRIEF ON BEHALF OF ILLINOIS BELL TELEPHONE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KENNETH F. BURGESS,
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BRIEF ON BEHALF OF ILLINOIS BELL TELEPHONE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This petition involves the same issues of law and fact which have been twice before this Court. *Berman* v. *Illinois Bell Telephone Company,* 304 U. S. 549 (1938); *Slattery, et al.* v. *Illinois Bell Telephone Company,* 307 U. S. 648 (1939).

Such questions as are presented arose out of protracted litigation popularly known as the Chicago Telephone Rate Case which has been before the United States District Court for the Northern District of Illinois, Eastern Division, and this Court for a period of seventeen years. It culminated in the decision of this Court in *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151 (1934). Therein the Supreme Court held that an injunction issued

in 1923 restraining the enforcement of an order of the Illinois Commerce Commission, which had reduced certain telephone rates in Chicago, should be dissolved. The Supreme Court in its mandate dated May 31, 1934 (R. 529-532) directed that the District Court should provide for the refunding of the amounts charged by the Company in excess of the rates in suit, in accordance with the terms of the injunction and the Company's bond given to support the same. All questions of public importance have been settled long ago and have been reviewed in repeated appeals to the Circuit Court of Appeals for the Seventh Circuit and to the Supreme Court. The present effort is to secure a different result on particular features upon the petition of a single subscriber.

Upon the filing of the mandate of this Court in the District Court, which had been convoked as a statutory court under Section 266 of the Judicial Code, that Court immediately set about to comply with the mandate. The task was prodigious. It involved a detailed examination of 45,000,000 collection tickets, several million collectors' reports and several hundred ledgers.

Confronted with this problem, the District Court set up a judicial and administrative machinery adequate to accomplish an expeditious compliance with the mandate. In so doing, by agreement of all parties (R. 18, 27), it acted in conformity with recommendations of counsel for the subscribers appointed by the Court (R. 29-43). In accordance with these recommendations and the unanimous agreement of the parties, the Court selected the respondent, rather than a special master, to make the refunds under the supervision of the Court, specified a three-year period during which subscribers should present their claims, provided the manner in which respondent should conduct the refunding, ordered the publication

of notices to subscribers and directed that upon the expiration of such three-year period the respondent, if it complied with the conditions of the decree, should be released from further liability. These provisions were all set forth in the decree entered June 11, 1934, from which no party appealed. For a complete recital of the work of making these refunds, see Plaintiff's Final Report (R. 325-364).

When the three-year period came to an end, the District Court found that respondent had complied with all the requirements of that decree, that the provisions of the decree including the refund period had been approved by all parties at the time of the entry of the decree, and that the decree itself had been final in respect to the length of the refund period as well as in respect to the determination of the right of the respondent to retain moneys which were unclaimed by subscribers during such period. The Court further found that restitution had been made to all subscribers entitled to refunds who had applied for the same and that failure of certain customers to call for their refunds was not caused by any neglect or other action on behalf of the Company, but, on the contrary, the Company and the attorneys representing the customers had advertised and endeavored in all reasonable ways, as directed by the Court, to locate unknown customers and to urge them to make application for their refunds. The Court further found that in many instances the customers entitled to refunds were indebted to the Telephone Company for unpaid telephone bills which would offset the amounts due the customers.* Its conclusion of law was

* Out of a total amount subject to refund of $18,798,980.14, consisting of $14,724,725.99 gross overcharges and $4,074,254.15 interest (R. 329), the Company had been able to refund all except $1,266,757.14 of overcharges, which would have carried with it $440,056.83 in interest (R. 335). Of the total of these unrefundable claims the Court in its opinion estimated that at least one-third represented claims by subscribers owing money to the Company offsetting their claims against the Company (R. 448-449, 455).

that the respondent was entitled to a decree discharging it from further liability and such a decree was entered February 5, 1938 (R. 466-469).

Subsequent to the entry of the order of February 5, 1938, that is, on March 2, 1938, appellant filed his petition for leave to intervene.* In this petition he alleged that he was a former subscriber who had been entitled to a refund which had been paid, except that there had been deducted therefrom by court order and paid to attorneys who had prosecuted the case to a successful conclusion and who had been designated by the Court to preserve the interests of the subscribers, 7½% of such refund (Order of July 23, 1934, R. 46-48). Appellant alleged that this deduction was improper, asked that the previous decrees of the District Court entered on June 1, 1934, July 23, 1934, and February 5, 1938, wherein the attorneys had been appointed to act for the subscribers, their compensation determined, and the Telephone Company finally discharged from further liability, be set aside. The gravamen of the petition for leave to intervene is that all of the said orders and decrees theretofore entered in the proceedings and inconsistent with the relief sought were illegal, because no notice of them had been served upon the appellant as an individual subscriber.

* Leave to intervene for themselves and other subscribers had already been sought by two individual subscribers (R. 318, 402, 425) and already had been denied (R. 464, 470). The denial of one of these petitions (Berman) was already on appeal to the United States Supreme Court (R. 465), which shortly thereafter affirmed the denial (R. 474-475). These petitions are discussed more fully hereafter in Section 2 (p. 8, *et seq.*).

REASONS FOR DENYING THE WRIT.

1. The case presented is not novel in this Court. It has been held many times that individual subscribers are not entitled to notice of nor to intervention in suits involving utility rates and that orders denying such intervention are not appealable.

Throughout the litigation, from the filing of the bill of complaint to the last order entered in the case, petitioner as a subscriber to the telephone service and as a member of the public was represented in this proceeding by the Attorney General of the State of Illinois and by the Illinois Commerce Commission, both parties to the proceedings from its inception. The City of Chicago, which was permitted to intervene almost at the outset of the proceedings, was active throughout the entire case in protecting the public and telephone subscribers, including petitioner.

In administering the refunds, the District Court undertook still further to protect the interests of the subscribers in a variety of ways. In its decree of June 1, 1934, the Court designated Messrs. George I. Haight and Benjamin F. Goldstein, who had conducted the litigation as special counsel for the City of Chicago, to act as counsel for the subscribers and "to protect and preserve" their rights and interests (R. 10-11). The Court, in a series of orders, prescribed in detail the manner in which the Telephone Company should make the refunds, including elaborate provisions in respect to computation, method of payment, search for subscribers, determination of the parties entitled to the refund, and a great variety of related provisions (R. 9, 39, 57, 273). The Telephone Company was required to make periodical reports to the Court, and also to publish from time to time a series of notices to subscribers in

newspapers of general circulation in the City of Chicago (R. 42, 273). Such reports were made (R. 49, 53, 66, 131, 210, 232, 278, 325-364) and such notices were published (R. 134, 264-273, 333, 334). In addition to this, the Court appointed its own representative, Prof. John A. Johnson (R. 52-53), to inform himself in detail in respect to the refunding operations, and to make periodical reports thereon to the Court. Prof. Johnson made twenty interim reports and a final report (R. 75, 143, 179, 203, 207, 223, 228, 236, 240, 244, 248, 252, 256, 260, 274, 286-310, 372-397). Further, the Court required three audits and reports thereon to be made by a firm of certified public accountants, Messrs. Touche, Niven & Company (R. 82-130, 217-221, 429-433).

The Illinois Commerce Commission represents the public and subscribers to the service (and thus petitioner) in suits to which it is a party, so that subscribers are bound by the decrees entered therein. *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587 (1926).

When represented by a proper governmental agency, individual subscribers are not permitted to intervene and an order denying such intervention is not an appealable order. *City of New York* v. *New York Telephone Company,* 261 U. S. 312 (1923); *Re Engelhard & Sons Company,* 231 U. S. 646 (1914); *O'Connell* v. *Pacific Gas & Electric Company* (C. C. A. 9th, 1927), 19 F. (2d) 460; *City of New York* v. *Consolidated Gas Company,* 253 U. S. 219 (1920); *San Antonio Utilities League* v. *Southwestern Bell Telephone Company* (C. C. A. 5th, 1936), 86 F. (2d) 584.

Petitioner and other individual subscribers were not parties to the suit at the time that any of the decrees were entered. No statute, rule of court, practice or procedure required or contemplated that such individual subscribers, not parties to the litigation, should be given notice of the

proceedings or proposed proceedings therein. In June, 1934, and for many months later, the identity of individual subscribers entitled to the refunds was not known. To have ascertained this identification and to have served notice in connection with each step in the proceedings, in which approximately a million present and former telephone subscribers were involved, would have created an impossible situation and an unbearable expense.

In *In re Denver & R. G. Western R. Co.*, 13 F. Supp. 821 (1936), individual bondholders sought to intervene in a reorganization proceeding under the Bankruptcy Act. The trustees of various mortgages under which bonds had been issued were parties to the proceeding. Intervention by individual bondholders was denied by the court, which said, at page 823:

> "I am persuaded that Congress did not intend to do away with the limitations on the number of parties that obtained under the equity practice. * * * An enumeration of the possible questions that come before the court, both in the routine management of the property confided to its care, and in effecting a reorganization, are so numerous and varied that to require a notice to every possible interested party would be nothing short of ridiculous, bog down the proceedings by the sheer weight thereof, and greatly increase the expense."

Certainly, the contention of petitioner that the decrees entered or proceedings had on June 1, 1934, July 23, 1934 and February 5, 1938, were invalid because he and other subscribers were not notified thereof is wholly lacking in substance and is no basis for intervention now.*

Petitioner here argues that certiorari should be granted because of the inadequacy of his representation in the

* Not without significance as showing the lack of substance to appellant's contention in respect to notice to individual subscribers is the fact that appellant himself undertook to give no such notice of his petition to other individual subscribers.

District Court. That this is not a fact can be ascertained by the most casual reading of the record, indicating as it does the greatest of care on the part of all persons representing the public and the subscribers to preserve the rights of the public and the subscribers throughout the entire course of the litigation. Even this is not necessary, however, since the petition for intervention filed in the District Court does not allege inadequacy of representation, and since petitioner must be limited to the allegations of his petition for intervention, his argument as to inadequacy of representation is improper and erroneous and should not be considered.

2. Petitioner's prayer to intervene was barred upon principles of res adjudicata.

The correctness of the decision sought to be reviewed has already been determined by this Court. Prior to Lackner's petition for leave to intervene, two other individual subscribers had petitioned for and been denied leave to intervene on their own behalf and on behalf of all other subscribers as a class. One of these petitions (filed by Schaffner) was denied in the final decree of February 5, 1938 (R. 470) and no appeal was taken therefrom. The other petition to intervene (filed by Berman) was denied on January 24, 1938, by Judge Evan A. Evans (R. 464), and again in the final decree of February 5, 1938. An appeal was taken by Berman from the denial of his petition to the United States Supreme Court, which affirmed the decision of the District Court without opinion. *Berman* v. *Illinois Bell Telephone Company,* 304 U. S. 549 (1938) (R. 474-476).

Berman's petition was identical in every essential point with Lackner's petition. Berman sought to intervene on behalf of himself and other subscribers. Berman sought

reimbursement for the 7½ per cent deduction from his refund on account of fees allowed by the District Court to Messrs. Haight and Goldstein. Berman sought to charge the unrefunded amounts remaining in the possession of the Telephone Company at the termination of the refund period with these deductions. In fact, the only difference between the two petitions is that Berman expressed a willingness to distribute such amount among the subscribers who had received refund checks (R. 318-325), while the appellant asks that a Master be appointed for this purpose (R. 478-488). In every essential particular, in fact down to the smallest detail, the two petitions for leave to intervene are alike in theory, in substance, in form, and in the ultimate relief requested. In both, the petitioners sought to intervene on behalf of the subscribers as a class. An examination of the two petitions laid side by side shows quite conclusively that Lackner had before him the Berman petition when he prepared and submitted his, and that he used it as a pattern.

If either petition is sufficient as a proceeding on behalf of a class, both are sufficient in that respect. On this assumption Lackner, the appellant here, was, of course, a member of the class for whom Berman sought to intervene. As such, he was bound as a party by the action of the District Court denying Berman's petition, and the decision of the Supreme Court affirming the District Court.

The law is well settled that a decree in a class action is binding upon all members of the class which was represented as a whole. In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921), the Supreme Court considered the effect of a dismissal of a class suit brought by a few non-resident members of an association on behalf of all of the members numbering more than 70,000. This suit had been dismissed for want of equity. Later other members of the class threatened to file similar suits

in the state courts, in which the same matters would have been relitigated. Thereupon an ancillary bill was filed in the original suit to enjoin all members of the association from instituting any such actions, on the ground that they had been bound by the prior decree. The lower court dismissed this ancillary bill. The Supreme Court, however, on appeal, reversed the lower court and held that, as members of the class, the prospective litigants were bound by the original decree. This was so even though they were not named parties to the original suit. Nevertheless, they were held to have been represented therein as members of a class. The Supreme Court held that if the original decree was to be effective and conflicting judgments avoided, all members of the class must be concluded by the decree. At page 367 the court said:

> "If the Federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization, and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective, and conflicting judgments are to be avoided, all of the class must be concluded by the decree."

We have previously noted that the same rule has been applied in respect of telephone subscribers who have been held to be bound by a decree entered in a suit against the Illinois Commerce Commission. *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587 (1926). In the language of the Supreme Court in that case "the commission represents the public and especially the subscribers, and they are properly bound by the decree" (p. 592).

Further, it has been held that an order, which denies a petition for leave to intervene, is such an order as constitutes *res adjudicata* with respect to a subsequent petition seeking the same relief. *United States Trust Company* v. *Chicago Terminal Transfer Railway Company* (C. C. A. 7th, 1911), 188 Fed. 292; *Beers* v. *Equitable Trust Company* (C. C. A. 8th, 1923), 286 Fed. 878.

It is therefore clear (1) that the principle of *res adjudicata* is applicable to all members of a class in a class suit, and (2) that the denial of an intervening petition constitutes *res adjudicata* as to subsequent petitions for leave to intervene. Hence, the decision of the District Court on Berman's appeal for leave to intervene affirmed by the Supreme Court constitutes *res adjudicata* as to Lackner, who was one of the class of subscribers for whom Berman sought to intervene.

3. Petitioner has no right to intervene for the purposes stated in the petition.

Petitioner, represented as he was throughout the entire litigation by counsel, seeks to intervene in this case for the purpose of attacking and having set aside the decrees theretofore entered by the District Court on June 1, 1934, July 23, 1934, and the final decree entered in this cause on February 5, 1938. Paragraph numbered E of the prayer of petitioner's petition to intervene asks (R. 487):

> "That the findings of fact, conclusions at law and final decree in its entirety entered herein on February 5, 1938, be vacated and set aside, and held for naught and the decree entered herein on June 1, 1934, in so far as it designates certain attorneys to protect and preserve the interests of various subscribers and the order of July 23, 1934, in so far as it fixes the fees of said attorneys, be vacated, modified or amended in conformity with the prayer hereof."

It is a well settled rule that intervention will not be

allowed for the purpose of impeaching a decree already made. *United States* v. *California Co-Op. Canneries*, 279 U. S. 553 (1929).

4. The correction of the record in the Circuit Court of Appeals by the inclusion of the check paid to petitioner was not error.

When petitioner in his reply brief before the Circuit Court of Appeals for the first time asserted that he was without knowledge of the deduction of attorneys' fees and the date at which the computation of interest had been discontinued, the Company, acting under paragraph (h) of Rule 75 of the Federal Rules of Civil Procedure, filed its suggestions for correction of the record so as to include the check paid to petitioner (R. 524-527). These suggestions as to this correction set forth the following averments (R. 525):

> "2. The check to Appellant covering his refund, dated April 23, 1935, shows on its face the deduction of 7½ per cent for attorneys' fees as ordered by the District Court on July 23, 1934, and likewise shows on its face that interest was added to the overcharges at the rate of 5 per cent per annum from the date of collection up to June 1, 1934, as ordered by the District Court June 11, 1934. The early date upon which Appellant was so directly and personally put upon notice of these facts becomes of value in the light of the alleged lack of such notice argued in Appellant's Reply Brief.
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> "All of the refund operations of Illinois Bell Telephone Company and all records made in connection therewith were under the jurisdiction of the District Court. The District Court had its own representatives present to supervise and check the operations and records of the Company throughout the refunding process. While this particular check was not formally introduced in evidence in this proceeding, it was one of the checks issued by the Telephone Company pursuant to the order of the Court and was retained by

it as a part of the records within the jurisdiction of the Court. The District Court had knowledge of the form of the checks issued by the Telephone Company under its direction in payment to subscribers entitled thereto and that such checks disclosed in each instance that attorneys' fees of 7½ per cent had been deducted and that interest on the refunds had been included up to June 1, 1934 pursuant to the decree of June 11, 1934 of the District Court. Under these circumstances, we submit that the reviewing Court is entitled to be advised of the facts in respect to the payment to Appellant under the order of the District Court as disclosed by the record preserved by order of that court and within its jurisdiction."

By order of the Circuit Court of Appeals dated February 6, 1940, the refund check was made a part of the record. (R. 537.)

The effect of the inclusion of this check in the record merely served to confirm what would have been presumed to be the fact in its absence. Petitioner had not pleaded lack of knowledge in his petition for intervention and since the facts are presumed against him in that respect, the inclusion of the check itself corroborates the presumption flowing from the failure to plead lack of actual knowledge.

5. Petitioner has no right to intervene under decisions and rules.

At the time petitioner presented his motion for leave to intervene, on March 2, 1938, the matter of intervention was governed by Federal Equity Rule 37. Prior to the time that the petition was denied by the District Court, the Federal Rules of Civil Procedure, including Rule 24(a), had become effective on September 16, 1938.

The Advisory Committee's Note in respect to this rule says:

"This rule amplifies and restates the present fed-

eral practice at law and in equity." (U. S. Supreme Court Reports Digest, Vol. 11, page 410.)

A comparison of the rule as adopted with the decisions prior to the adoption fully bears out the Advisory Committee's Note.

It is evident, therefore, that petitioner had no new rights granted him to intervene by reason of the fact that this rule became effective; nor did that fact refresh any rights already stale. Moreover, petitioner's belated attempt to intervene flies in the face of the specific provision of the rule (and prior holdings of the courts) that application must be timely.

As we have noted many times above, petitioner did not seek intervention until March, 1938, at which time he sought to set aside orders theretofore entered in the cause at times almost four years prior to his petition for intervention. Federal Equity Rule 24(a) and the cases relating to intervention prior to the adoption of that rule all require "timely application" for intervention.

In the absence of special circumstances, intervention is never permitted after final judgment or decree. *Clarke* v. *Boysen, et al.* (C. C. A. 8th, 1922), 285 Fed. 122; *Caldwell* v. *Guardian Trust Co.* (C. C. A. 8th, 1928), 26 F. (2d) 218; *Hight* v. *Batley,* 32 Wash. 165, 72 Pac. 1034 (1903). Even where there would have been a right to intervene if applied for prior to decree, delay until after decree has been entered makes the intervention discretionary only. *Bogart* v. *Southern Pac. Co.* (C. C. A. 2d, 1923), 290 Fed. 727 at 731. Likewise, it is a well settled rule, as stated by Mr. Justice Brandeis, "that intervention will not be allowed to impeach a decree already made." *United States* v. *California Co-Op. Canneries,* 279 U. S. 553 (1929). See also to the same effect in this Circuit: *Rheinberger* v. *Security Life Insurance Co. of America* (C. C. A. 7th, 1934), 72 F. (2d) 147.

Concerning the timeliness of the application, the Circuit Court of Appeals said:

> "It cannot be said that petitioner's petition to intervene was timely; and in our opinion it would be a misapplication of the rule permitting intervention to allow petitioner to intervene after final judgment to upset an order of the court of which he had actual notice more than two years prior to final judgment, and, especially so, when it appears that he had accepted the benefits of the order with full knowledge of, and acquiescence in, that portion of the order of which he now complains."

A substantially similar problem was considered recently by Judge Chesnut in the District Court of Maryland. In *The Baltimore Trust Company* v. *Interocean Oil Company*, 30 F. Supp. 484 (November 14, 1939), the intervening petition of one Hoffman, alleged holder of one bond of the Interocean Oil Company, was under consideration. It appeared that orders had been theretofore entered which the intervening petitioner desired to attack and concerning which he desired an appeal. The court said:

> "* * * But apart from this, I have reached the conclusion, after some consideration of arguments of counsel, that the petition should be denied because it was not 'timely filed.' Rule 24 of Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, provides for intervention both of right and permissive but only 'upon timely application.' Here the petition was not filed 'timely' as it comes five weeks after the decree and after appeal therefrom has been taken by the American Trading and Production Corporation; and is professedly filed only for the purpose of taking an appeal from that decree.
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> "While I am reluctant to exercise a discretion in refusing the petition for intervention which may seem to limit or restrict in any way the full opportunity for appeal as to any aspect of the decree of September 25, 1939, I have concluded that in the particular case it is my duty to deny this petition. Petitions for intervention after a decree are very un-

usual and are seldom granted. *United States* v. *Northern Securities Co.*, C. C., 128 F. 808; *Cincinnati, I. & W. R. Co.* v. *Indianapolis Union R. Co.*, 6 Cir., 279 F. 356. In a very similar case in this circuit leave to intervene was denied to an individual bondholder who desired to be made a party so that he could appeal from a prior decree. In that case the holding was placed particularly on the ground that the bondholder was represented in the proceeding by a mortgage trustee who had elected not to appeal. *Fink* v. *Bay Shore Terminal Co.*, 4 Cir., 144 F. 837, affirmed, 203 U. S. 577, 27 S. Ct. 777, 51 L. ed. 325. See also *Stallings* v. *Conn*, 5 Cir., 74 F. 2d 189; *Palmer* v. *Bankers' Trust Co.*, 8 Cir., 12 F. 2d 747; *Caldwell* v. *Guardian Trust Co.*, 8 Cir., 26 F. 2d 218; *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 556, 49 S. Ct. 423, 73 L. ed. 838; *Rheinberger* v. *Security Life Ins. Co.*, 7 Cir., 72 F. 2d 147."

WHEREFORE, respondent prays that the Petition for a writ of certiorari be denied.

Dated: July 25, 1940.

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